



## FinCEN and Federal Reserve Propose to Significantly Lower Threshold for International Funds Transfers Under Recordkeeping and Travel Rules

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On October 27, 2020, the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) and the Board of Governors of the Federal Reserve System (Federal Reserve, together with FinCEN, "the Agencies") published a joint notice of proposed rulemaking to amend the Recordkeeping Rule<sup>[1]</sup> and Travel Rule<sup>[2]</sup> regulations under the Bank Secrecy Act (BSA). The proposed amendments would reduce the applicable threshold for international funds transfers from \$3,000 to \$250 and, consistent with FinCEN's existing guidance, formally extend these rules to cover convertible virtual currencies (CVCs) and digital assets used as legal tender. The threshold for domestic funds transfers would remain unchanged at \$3,000.

The threshold in the proposed rules is significantly lower than the minimum threshold of \$1,000 or €1,000 recommended by the Financial Action Task Force (FATF), an intergovernmental body that develops anti-money laundering and counter-terrorism financing standards and promotes their effective implementation.<sup>[3]</sup> FATF's recommended threshold has been adopted by the European Union and by a vast number of jurisdictions around the world.

Although the Agencies believe that lowering the threshold to \$250 would likely lead to the preservation of information that would benefit law enforcement and national security investigations,<sup>[4]</sup> the anticipated changes would increase regulatory compliance costs for financial institutions. Money services businesses (MSBs), particularly money transmitters and CVC operators, may face the greatest compliance challenges due to their business models and the fact that they are more likely than other financial institutions to deal with nonestablished customers.<sup>[5]</sup>

### Funds Transfers That Begin or End Outside the United States To Be Subject to Proposed Threshold

As noted above, the proposed rulemaking would lower the threshold to \$250 for international funds transfers — those that begin or end outside the United States.<sup>[6]</sup> A funds transfer would be considered to begin or end outside the U.S. if the financial institution knows or has reason to know that the transmitter, transmitter's financial institution, recipient or recipient's financial institution is located in, ordinarily resident in or organized under the laws of a jurisdiction other than the United States or a jurisdiction within the United States. According to the Agencies, a financial institution would have "reason to know" that a funds transfer begins or ends outside the United States only to the extent that such information could be determined based on the information the financial institution (a) receives in the transmittal order, (b) collects from the transmitter to effectuate the transmittal of funds, or (c) otherwise collects from the transmitter or recipient to comply with the BSA. It is not clear whether under this "reason to know" standard, information collected from the transmitter or recipient "to comply with the BSA" would encompass, for example, any information gathered from a customer to comply with the BSA's know-your-customer requirements.

The difficulties financial institutions face in determining whether a funds transfer is covered by the \$250 threshold may depend on their role in the funds transfer. While a transmitter's financial institution should not have trouble in making this determination, intermediary financial institutions, such as correspondent banks, and beneficiary financial institutions may lack full visibility into relevant funds transfer information if the transmitter's financial institution, or a preceding intermediary financial institution in the funds transfer, does not provide complete and accurate information or uses nontransparent payment message formats.

### CVCs and Digital Assets To Be Explicitly Covered by the Recordkeeping and Travel Rules

While FinCEN has previously issued guidance that funds transfers involving CVCs are subject to the Recordkeeping and Travel rules,<sup>[7]</sup> the proposed revision to the definition of "money" would provide additional clarity by codifying FinCEN's prior guidance. The term "money," as used in these rules, would be amended to include: (a) a medium of exchange currently authorized or adopted by a domestic or foreign government, including any digital asset that has legal tender status in any jurisdiction;<sup>[8]</sup> and (b) a CVC, defined as a medium of exchange (such as cryptocurrency) that either has an equivalent value as currency or acts as a substitute for currency, but lacks legal tender status.

### MSBs May Face More Onerous Burdens Than Other Financial Institutions

The Agencies' proposed rules would apply to all financial institutions regulated under the BSA, but MSBs may be more significantly impacted. The Agencies indicated that based on public comments received in 2006 in connection with their review of the threshold in the Recordkeeping and Travel rules,<sup>[9]</sup> it appears that almost all banks, regardless of size, already maintain records of all funds transfers irrespective of the dollar amount, including those transfers below the \$3,000 threshold. However, the same is not the case for the more than 12,000 money transmitters that would be affected by the proposed threshold.<sup>[10]</sup> Since MSBs are not subject to the BSA's Customer Identification Program rule and thus tend to serve nonestablished customers, MSBs may not already separately collect and verify the basic customer information required by the Recordkeeping Rule for funds transfers below the existing \$3,000 threshold. As a result, the broader universe of international funds transfers that would be covered under the proposed rules may significantly increase MSBs' compliance burdens.

### Greater Compliance Challenges Expected for Money Transmitters in the CVC Industry

Compliance with the proposed threshold can be expected to add to the unique challenges that money transmitters dealing in CVC face to comply with the Travel Rule — especially given that the CVC industry is largely based on the concepts of preserving anonymity and decentralization. One such challenge is that unlike banks, blockchain protocols are not generally designed to enable the transmission of information required by the Travel Rule. Money transmitters of CVC already have been grappling with how to transmit required information while doing so in a way that complies with varying data privacy laws across jurisdictions. Although the nature of these challenges should not change given FinCEN's existing guidance on CVCs, the proposed lower threshold could add to these challenges, as a significantly higher number of transactions would be within the scope of the Travel Rule.

### Agencies Outline Key Issues for Further Consideration

The Agencies are still assessing several aspects of the proposed rules. Notably, among other requests, the Agencies have requested comment on the extent of the burden on financial institutions if (a) the proposed threshold were extended to all transactions, including domestic transactions; (b) the Agencies were to select a threshold of \$250 but not require nonbank financial institutions to collect a Social Security number or employer identification number for nonestablished customers engaging in international funds transfers between \$250 and \$3,000; (c) the Agencies issued specific guidance about appropriate forms of identification to be used in conjunction with identity verification; or (d) the Agencies were to include in the regulation the "reason to know" standard for determining when an institution would be subject to the \$250 threshold for international funds transfers.

Accordingly, the proposed rules present a level of uncertainty given that the final content of the rules is subject to change in response to comments from the industry and law enforcement. Financial institutions, particularly MSBs, should consider assessing their level of exposure to international funds transfers at or above \$250 to better understand the potential impact of the proposed rule on their business activities. Financial institutions may want to determine whether increased staffing and additional or upgraded information technology systems may be needed for effective compliance with the proposed rules.

### Footnotes

[1] The Recordkeeping Rule currently requires that financial institutions collect and retain certain information for funds transfers of \$3,000 or more, such as the originator's name and address, the amount and date of the payment order, payment instructions, and the identity of the beneficiary's bank. Financial institutions are also required to verify the identity of the person making or receiving a funds transfer if the order is made or delivered in person and the person is not an established customer. See 31 C.F.R. § 1020.410(a) (rule for banks); 31 C.F.R. § 1010.410(e) (rule for nonbank financial institutions).

[2] The Travel Rule requires financial institutions to transmit similar information to that required under the Recordkeeping Rule to receiving financial institutions for funds transfers of \$3,000 or more. See 31 C.F.R. § 1010.410(f).

[3] See the FATF Recommendations at 79.

[4] The Agencies analyzed suspicious activity reports (SARs) filed by money transmitters in recent years that indicate a substantial volume of potentially illicit funds transfers occur below the \$3,000 threshold. The mean and median dollar value of approximately 1.29 million transactions of funds mentioned in the SARs reviewed were approximately \$509 and \$255, respectively.

[5] An "established customer" is defined as "a person with an account with the financial institution, including a loan account or deposit or other asset account, or a person with respect to which the financial institution has obtained and maintained the person's name and address, as well as taxpayer identification number (e.g., social security or employer identification number) or, if none, alien identification number or passport number and country of issuance, and to which the financial institution provides financial services relying on that information." 31 C.F.R. § 1010.100 (p).

[6] The United States includes the District of Columbia, the Indian lands, and the territories and insular possessions of the United States. See 31 C.F.R. § 1010.100 (hhh).

[7] On May 9, 2019, FinCEN released interpretative guidance to provide greater clarity about existing compliance obligations applicable to CVCs. As before, FinCEN defined a CVC as "value that substitutes for currency" and stated that "exchangers" and "administrators" of CVCs are generally considered money transmitters subject to the BSA's requirements, including the Recordkeeping and Travel rules.

[8] "Money" would also include a monetary unit of account established by an intragovernmental organization or by agreement between two or more countries.

[9] 71 FR 35564 (June 21, 2006).

[10] The Agencies stated that in the public comments received in 2006, "many money transmitters indicated that they maintained records of transfers/transmittals at approximately the \$1,000 level."

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